

This case is on appeal to the Board for the fifth time. On October 9, 1987 appellant, then a 40-year-old distribution clerk, filed a claim alleging that he was struck that day by a heavy cart. He stopped work that day. Appellant returned to work on December 4, 1987 for four hours a day with restrictions and stopped work again on December 16, 1987. On July 29, 1991 he returned

to work in a four-hour-a-day position. Appellant left work in December 1993 and has not returned. The Office accepted the claim for a lumbar strain and the subsequent conditions of sciatica and myofascial pain syndrome.

On the first appeal, the Board found that the Office did not abuse its discretion in denying authorization for the purchase of orthopedic work boots.¹ In the second appeal, the Board dismissed appellant's appeal for lack of jurisdiction.² The record reflects that appellant filed a claim for a schedule award on January 24, 2001. On the third appeal, the Board found that the case was not in posture for decision with respect to the schedule award determination and set aside the Office's March 18, 2004 decision which had denied modification of its November 26, 2002 schedule award for a 16 percent right and a 14 percent left lower extremity impairment and remanded the case for further action consistent with its decision.³ The Board found that Dr. Cohen, the medical adviser, had improperly reviewed the March 7, 2002 report of Dr. Graf, the impartial medical specialist, as he was part of the original conflict in medical opinion. The Board additionally found that Dr. Cohen went outside the confines of Dr. Graf's March 7, 2002 report and had allowed previously reviewed medical evidence to factor into the schedule award determination. Accordingly, the Board remanded the case to the Office to have another Office medical adviser review Dr. Graf's March 7, 2002 report.

On the fourth appeal, the Board found that appellant had greater than a 38 percent lower extremity impairment for which he received a schedule award.⁴ The Board found the well-reasoned opinion of Dr. Graf, the impartial medical specialist in this case, took precedence over the Office medical adviser and established a 62 percent total impairment to the lower extremities. In his March 7, 2002 report, Dr. Graf's characterization of appellant's gait and disturbance of walking met the criteria of a Class 2 gait disorder and "at times" met the criteria of a Class 3 gait disorder as "the patient requires the aid of a cane ... and rises and maintains standing positions with difficulty." He assigned appellant 25 percent whole person impairment, which is a lower end of a Class 3 impairment, which the Board noted corresponded to a 62 percent impairment of both lower extremities under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition, Table 17-3, page 527. Accordingly, the Board set aside the Office's March 29, 2005 decision as to the determination of the total schedule award for the lower extremities and remanded the case to the Office to compensate appellant for a 62 percent total impairment to his lower extremities. The facts and history surrounding the prior appeals are set forth in the prior decisions and are hereby incorporated by reference.

In his March 7, 2002 report, Dr. Graf, the impartial medical specialist, advised that his examination did not confirm a complete motor deficit in the right lower extremity or the

¹ Docket No. 93-205 (issued December 23, 1993).

² Docket No. 94-1140 (issued June 3, 1996).

³ 56 ECAB ____ (Docket No. 04-1652, issued February 16, 2005).

⁴ Docket No. 06-1382 (issued December 20, 2005).

presence of any sensory deficit in the lower extremities. Dr. Graf utilized the fifth edition of the A.M.A., *Guides* and stated:

“In rating [appellant’s] permanency, reference is made to Table 15-18, Unilateral Spinal Nerve Root Impairments affecting the lower extremities with loss of function due to alteration in strength in the anterior tibial tendon and posterior tibial tendon with further reference to Table 13-15, Criteria for Rating Impairments Due to Station and Gait Disorders. This patient has an abnormality in station and gait. Examination confirms his ability to rise to a standing position but walking some distance is performed with difficulty and is limited to essentially level surfaces. At times the patient requires the aid of a cane and at times rises and maintains standing positions with difficulty. The patient is judged to meet the criteria between Class II and Class III of Table 13-15 with a 25 percent whole person impairment. A 25 percent whole person impairment is converted to a 62 percent lower extremity impairment by referencing page 527, Table 17-3, which includes whole person impairment values calculated from lower extremity impairment.”

Dr. Graf advised that his impairment rating under Table 13-15 could be cross-referenced with Table 15-18. He stated, however, that the permanencies assigned through consideration of the gait pattern changes through station and gait disorder caused by the patient’s spinal condition and motor deficits which were documented in the examination could not be combined since they were both manifestations of the same condition.

By decision dated March 1, 2006, the Office granted appellant an “additional 24 percent impairment to the lower extremity (total of 62 percent impairment to the lower extremity).” The schedule award ran for the period April 6, 2001 through August 2, 2002 for 69.12 weeks of compensation.

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees’ Compensation Act⁵ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence. Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ The schedule award provisions of the Act⁷ and its implementing federal regulation⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8107(a).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.⁹

ANALYSIS

The Office accepted appellant's claim for a lumbar, sciatica and myofascial pain syndrome. In the fourth appeal of this matter, the Board found that the well-reasoned opinion of Dr. Graf, the impartial medical specialist, took precedence over the Office medical adviser and established a 62 percent total impairment to both lower extremities. The Board's determinations are binding upon the Office and must, of necessity, be so accepted and acted upon by the Director of the Office. Otherwise, there could be no finality of decisions and the whole appeals procedure would be nullified and questions would remain moot.¹⁰

On remand, the Office awarded an "additional 24 percent impairment to the lower extremity (total of 62 percent impairment to the lower extremity)." On appeal, appellant argues that he should have received 62 percent total impairment to each lower extremity. The Board agrees.

In rating appellant's impairment, Dr. Graf's examination revealed that appellant had an abnormality in station and gait. His examination referred to both lower extremities and he did not distinguish between appellant's right or left lower extremity in rating appellant's permanency. Thus, the Board noted that Dr. Graf's assignment of a 25 percent whole person impairment based on station and gait corresponded to a 62 percent impairment of both lower extremities under the A.M.A., *Guides*, Table 17-3, page 527. Appellant previously received schedule awards for a 38 percent impairment to each lower extremity. The Office, in awarding appellant an additional schedule award of 24 percent to the lower extremity, properly subtracted appellant's previously received schedule award of 38 percent from the 62 percent total lower extremity award to which he is entitled. However, appellant's entitlement to the 62 percent total lower extremity award refers to each lower extremity.¹¹ As appellant only received his increased schedule award for one lower extremity, he remains entitled to an additional schedule award of 24 percent for his other lower extremity.

The Board further notes that the Office's March 1, 2006 decision properly indicated that appellant was payable an additional 69.12 weeks of compensation for his additional 24 percent schedule award. The amount of compensation for total loss of use of the lower extremity with 100 percent impairment is 288 weeks.¹² Appellant is entitled to 178.56 weeks of compensation for a 62 percent total impairment of each lower extremity. He has received compensation for 38 percent impairment or 109.44 weeks of compensation for each of his lower extremities. The

⁹ *Id.*

¹⁰ See *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949).

¹¹ Furthermore, the Board has held that each leg impairment is considered separately under the Act; there is no provision for bilateral leg impairment. *Carl J. Cleary*, 57 ECAB ____ (Docket No. 05-1558, issued May 10, 2006).

¹² See 5 U.S.C. § 8107.

amount due appellant for a 24 percent impairment to the lower extremity is 69.12 weeks of compensation. Thus, the Office's calculation that he is entitled to an additional 69.12 weeks of compensation for the 24 percent additional schedule award of a lower extremity is correct with respect to one lower extremity. However, as noted above, this calculation must be made for each lower extremity.

The Board will affirm the Office's March 1, 2006 decision, insofar as it awarded a schedule award of an additional 24 percent to one lower extremity (for a total award of 62 percent) impairment. However, the Board will remand the case to the Office to compensate appellant for the remaining 24 percent schedule award for his other lower extremity (for a total award of 62 percent).

CONCLUSION

The Board finds that appellant is entitled to 62 percent total lower extremity impairment for each of his lower extremities, for which he received a total schedule award of 62 percent for only one lower extremity. The case will be returned to the Office for further action consistent with this opinion.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2005 decision of the Office of Workers' Compensation Programs is affirmed as to the determination of the total schedule award for one lower extremity and the case is returned for further action consistent with this opinion.

Issued: January 22, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board